No. 24-957

In the Supreme Court of the United States

WILLIAM STENGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in assuming without deciding it had jurisdiction to review the denial of petitioner's petition for a writ of *coram nobis* on the merits.

2. Whether a federal court has jurisdiction to modify a criminal restitution order by writ of *coram nobis*.

RELATED PROCEEDINGS

United States District Court (D. Vt.):

United States v. *Stenger*, No. 19-cr-76 (Apr. 15, 2022) (criminal judgment)

United States v. *Stenger*, No. 19-cr-76 (May 15, 2023) (denying petition for a writ of *coram nobis*)

United States Court of Appeals (2d Cir.):

United States v. *Stenger*, No. 23-6528 (June 28, 2024)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is available at 2024 WL 3220260. The order of the district court (Pet. App. 14a-23a) is available at 2023 WL 12019411.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2024. A petition for rehearing was denied on September 27, 2024 (Pet. App. 12a-13a). On December 18, 2024, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 24, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Vermont, petitioner was con-

victed on one count of making a false statement, in violation of 18 U.S.C. 1001. C.A. App. 429. He was sentenced to 18 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $250,000 in restitution. *Id.* at 430-431, 434-435, 438. Petitioner did not appeal, but about a year later, he filed a petition for a writ of *coram nobis* seeking to vacate the restitution order. Pet. App. 4a. The district court denied the petition. *Id.* at 14a-23a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Under the EB-5 Immigrant Investor Program, foreigners can apply to become lawful permanent residents of the United States by investing in commercial enterprises approved by U.S. Citizenship and Immigration Services (USCIS) and, for investments made in Vermont, by the Vermont EB-5 Regional Center (VRC). See *Liu* v. *SEC*, 591 U.S. 71, 77 (2020); Gov't C.A. Br. 4. Petitioner and his codefendants managed the Jay Peak Biomedical Research Park EB-5 investment project, also known as the AnC Vermont project. Presentence Investigation Report (PSR) ¶¶ 12-16. The AnC Vermont project was to be funded by EB-5 investors and involve the construction and operation of a biotechnology facility in Newport, Vermont. Pet. App. 3a.

An EB-5 investor must demonstrate that his investment has created, or will create, ten jobs within a few years. Gov't C.A. Br. 4. Accordingly, petitioner's "primary objective was to convince [prospective EB-5] investors, the VRC, and ultimately USCIS, that the project would soon create the requisite number of jobs." PSR ¶ 20. To do so, petitioner obtained a jobs forecast based on inflated financial projections and used it to promote the AnC Vermont project to investors, regulators, politicians, and the public. *Ibid.*; Gov't C.A. Br. 7-8.

By June 2014, the VRC was concerned about multiple aspects of the AnC Vermont project, including the lack of support for financial projections and the lack of information about requisite approvals from the Food and Drug Administration (FDA). Gov't C.A. Br. 9. The VRC ordered petitioner to suspend offering and marketing the AnC Vermont project until various questions were answered and the VRC had approved revised offering materials. *Id.* at 9-10; PSR ¶ 80.

In an effort to convince state regulators to let him resume marketing the AnC Vermont project, petitioner made a number of submissions. As most relevant here, in January 2015, he submitted various materials to the VRC, including a letter from a consulting firm stating that the AnC Vermont business projections were reasonable, and a timeline regarding commercialization of the project's biomedical products. Gov't C.A. Br. 10. Those submissions were false. Among other things, petitioner knew that the consulting firm had not analyzed the relevant projections and that the timeline did not include or reasonably account for the need to consult with FDA and obtain FDA approval. *Ibid.*; PSR ¶¶ 82-83.

In April 2015, state regulators permitted petitioner to resume marketing the AnC Vermont project. Gov't C.A. Br. 10. Petitioner continued fundraising until the Securities and Exchange Commission (SEC) filed a civil complaint in 2016 and successfully petitioned a court to appoint a receiver for the AnC Vermont Project. *Id.* at 4-5, 7-8. All told, petitioner raised about $85 million in capital investments, plus $8 million in administrative fees, from 169 different investors. *Id.* at 4-5. The AnC Vermont facility was never constructed.

2. A federal grand jury sitting in the District of Vermont returned a 14-count indictment against petitioner

and his three codefendants. Indictment 1-31. Petitioner pleaded guilty to one count of making false statements, in violation of 18 U.S.C. 1001, in connection with his January 2015 submissions to the VRC. Pet. App. 3a.

At sentencing, the government requested that petitioner be ordered to pay restitution to the 36 investors who made investments in the AnC Vermont project after petitioner's January 2015 fraudulent submissions to the VRC. Pet. App. 16a. Because those investors had already been refunded their principal, the government sought restitution only for the administrative fees that had not yet been repaid. *Ibid.* It was undisputed that that amount totaled $1,664,928. *Ibid.*

Petitioner objected to paying any restitution, however, on the theory that the sole proximate cause of the investors' losses was the Vermont regulators' decision in April 2015 to lift the marketing hold and allow petitioner to resume marketing the AnC Vermont project to investors. Pet. App. 17a. The district court, after briefing and an evidentiary hearing, rejected that contention. *Id.* at 18a. Although the court "accepted for purposes of argument" petitioner's submission that "'there were sufficient . . . red flags and warning signs that the regulatory agency and the State should not have allowed the investment to be marketed again in April of 2015,'" the court found that his false statements were a proximate cause of the investors' losses, even if not the sole cause. *Ibid.* (citation omitted); see *United States* v. *Calderon*, 944 F.3d 72, 95 (2d Cir. 2019), cert. denied, 141 S. Ct. 953, and 141 S. Ct. 954 (2020). Among other things, the court noted that petitioner's own witness at the evidentiary hearing, former state regulator Susan Donegan, "testified that [petitioner's] statement to her about future job creation—the false statement alleged

in [the count of conviction]—was material to her decision to release the hold on the AnC Bio investment." Pet. App. 17a.

The district court reduced the restitution amount from about $1.7 million to $250,000 in light of petitioner's limited work capacity and health restrictions. Pet. App. 18a. The court also sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. C.A. App. 430-431. Petitioner did not appeal. Pet. App. 4a, 9a-10a.

3. About a year later, shortly after leaving prison, petitioner filed a petition for a writ of *coram nobis* pursuant to the All Writs Act, 28 U.S.C. 1651. Gov't C.A. Br. 14. Petitioner sought to vacate the restitution order and renewed his argument that his false submissions in January 2015 were not a proximate cause of the investors' losses. Pet. App. 4a. He cited two internal memoranda authored by a state regulator in February 2015 "describ[ing] calls between [state] and SEC employees regarding suspicions of fraud surrounding EB-5 projects in Vermont, including the AnC project." *Id.* at 5a; see *id.* at 4a.

The district court denied the petition. Pet. App. 14a-23a. It explained that *coram nobis* "permits the correction of fundamental errors in a criminal judgment when appeal or collateral review through 28 U.S.C. § 2255 are not available," but only if the petitioner shows that "extraordinary circumstances are present compelling such action to correct a fundamental error" and "[s]ound reasons exist[] for failure to seek appropriate earlier relief." *Id.* at 19a-20a. The court concluded that petitioner satisfied neither requirement. It observed that he was seeking to relitigate the same theory he unsuccessfully pursued at his sentencing, namely that his false state-

ments were not a proximate cause of the investors' losses. *Id.* at 20a-21a. And the court noted that petitioner's "late discovery" of the two internal memos did not "excuse [him] from raising the issue previously," given that the government had provided those documents to the defense "on three separate occasions" beginning more than two years before petitioner's sentencing. *Id.* at 21a; see *id.* at 4a-5a.

4. The court of appeals affirmed by summary order. Pet. App. 1a-11a. It "assume[d], without deciding, that a writ of *coram nobis* is available to challenge a noncustodial component of a sentence, including a restitution order." *Id.* at 7a n.2. Declining petitioner's request to decide the jurisdictional issue, the court cited circuit precedent holding that "where the jurisdictional issue is statutory in nature—as it is here, under the All Writs Act—we may assume hypothetical jurisdiction and address the substance of claims that are plainly without merit." *Ibid.* On the merits, the court rejected petitioner's *coram nobis* claim for essentially the same reasons cited by the district court. See *id.* at 7a-10a.

ARGUMENT

Petitioner contends (Pet. 16-20) that the court of appeals erred by assuming without deciding it had jurisdiction over his *coram nobis* challenge to the restitution order, but further contends (Pet. 20-22) that the court's assumption was in fact correct. This Court lacks jurisdiction to review those abstract claims, and they would not warrant further review in any event.

1. Petitioner lacks Article III standing to seek this Court's review of the questions presented.

a. "The requirement of standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *West*

Virginia v. *EPA*, 597 U.S. 697, 718 (2022) (citation omitted). "In considering a litigant's standing to appeal, the question is whether it has experienced an injury 'fairly traceable to the judgment below'" and whether "a 'favorable ruling' from the appellate court 'would redress that injury.'" *Ibid.* (brackets, citations, and emphasis omitted).

Petitioner cannot satisfy either requirement. First, he sustained no injury from the only aspect of the judgment below that he challenges in this Court: the court of appeals' exercise of "hypothetical jurisdiction" over his *coram nobis* claim. Pet. App. 7a n.2. After all, petitioner himself *invoked* the lower courts' jurisdiction to review that claim on the merits, and he believes that the court of appeals' jurisdictional hypothesis was correct. In these circumstances, the court's exercise of jurisdiction on a hypothetical rather than definitive basis does not inflict the kind of "concrete injury" required for Article III standing. *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 433 (2019).

Second, even if the court of appeals' ultimate decision to deny petitioner *coram nobis* relief counted as the relevant Article III injury, a favorable ruling by this Court would not redress that injury. Again, petitioner challenges only the court of appeals' failure to resolve the jurisdictional question. At most, this Court would vacate the judgment and remand, see Pet. 8, whereupon the lower courts would either (a) conclude that they lack jurisdiction and dismiss petitioner's *coram nobis* petition, or (b) decide that they have jurisdiction and deny relief on the merits, as they already did upon considering the merits. Either way, petitioner would not prevail, and this Court's resolution of the questions presented would amount to an advisory opinion.

b. Petitioner appears to hypothesize (Pet. 28) that a favorable ruling from this Court would make a difference because the court of appeals would "take[] a more careful approach to the merits" if it had to resolve the jurisdictional issue. But such speculation cannot satisfy Article III's redressability requirement. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And petitioner's speculation is baseless. The court of appeals' analysis of the merits below was both careful and correct. Indeed, petitioner does not directly dispute it.

A court may grant postconviction relief pursuant to a writ of *coram nobis* only for errors "'of the most fundamental character,'" and only when "sound reasons exist[] for failure to seek appropriate earlier relief." *United States* v. *Morgan*, 346 U.S. 502, 512 (1954) (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)); see *id.* at 510-511; see also *United States* v. *Denedo*, 556 U.S. 904, 911 (2009). This Court has made clear that "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at 511.

As both the court of appeals and the district court thoroughly explained, petitioner cannot satisfy those demanding requirements. His *coram nobis* claim is premised on documents that were in the defense's possession long before sentencing. And that claim simply rehashes petitioner's flawed argument at sentencing that his false statements could not have proximately caused investor losses if state regulators were aware of red flags with the AnC Vermont project. See Pet. App. 7a-11a; *id.* at 19a-23a. This Court's resolution of petitioner's jurisdictional claims would not result in "a dif-

ferent outcome on the merits" (Pet. 28) of his *coram nobis* claim.

In short, petitioner seeks this Court's review of jurisdictional questions that were not decided against him below, in a transparent effort to obtain an opportunity to litigate his factbound and meritless restitution claim for a third time. That does not present a cognizable case or controversy under Article III, so this Court would lack jurisdiction to review petitioner's claims.

2. Even if petitioner had standing, further review would be unwarranted.

a. Petitioner urges (Pet. 8-16) this Court to resolve disagreement among the courts of appeals on whether and when it is appropriate for federal courts to exercise "hypothetical statutory jurisdiction"—*i.e.*, to reach and reject a claim on the merits "[w]here a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other more obvious grounds." *Waleski* v. *Montgomery, McCracken, Walker & Rhoads, LLP*, 143 S. Ct. 2027, 2027 (2023) (Thomas, J., dissenting from denial of certiorari) (citation omitted). That practice is at least in tension with *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), which rejected hypothetical Article III jurisdiction, *id.* at 93-102, and suggested that courts may not assume statutory jurisdiction either, see *id.* at 101. Even so, the exercise of hypothetical statutory jurisdiction is often—as in this case—of limited practical importance, insofar as courts apply it when presented with claims "that are plainly without merit." Pet. App. 7a n.2. Indeed, as Justice Scalia explained, when "the absence of a cause of action is so clear that [the plaintiffs'] claims are frivolous," that "establish[es] another *jurisdictional* ground for dismissal that the *Steel Co.* majority opinion acknowl-

edges." *Tenet* v. *Doe*, 544 U.S. 1, 12 (2005) (Scalia, J., concurring) (citing *Steel Co.*, 523 U.S. at 89). And this Court has repeatedly denied petitions for certiorari presenting the same issue. See *Waleski*, *supra* (No. 22-914); *Vitol S.A.* v. *Autoridad de Energia Electrica de Puerto Rico*, 584 U.S. 1013 (2018) (No. 17-951); *Hoffman* v. *Nordic Naturals, Inc.*, 582 U.S. 931 (2017) (No. 16-1172).

At all events, even assuming that the hypothetical-jurisdiction issue warranted this Court's review at this time, this case would be an unsuitable vehicle for addressing it for largely the same reasons petitioner lacks standing: the courts below correctly rejected petitioner's *coram nobis* claim on the merits, so the jurisdictional issue could not affect the ultimate outcome. Even where it would technically have jurisdiction, this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties. *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882); see *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the [c]ourts of [a]ppeals is judicial, not simply administrative or managerial.").

Although petitioner contends (Pet. 27) that every hypothetical-jurisdiction case will have the same vehicle problem—which, in any event, would hardly counsel in favor of certiorari—it is not clear that he is correct. In *Waleski,* for instance, the petitioner contended that the federal courts *lacked* statutory jurisdiction to consider his state-law claims, and that the district court should have remanded the claims to state court rather than dismiss them on the merits. *Waleski* v. *Montgomery,*

McCracken, Walker & Rhoads, LLP (*In re Tronox Inc.*), No. 20-3949, 2022 WL 16753119, at *1 (2d Cir. Nov. 8, 2022), cert. denied, 143 S. Ct. 2027 (2023). In other words, unlike petitioner here, the petitioner in *Waleski* would have received the relief he sought from the federal court of appeals—namely, the return of his state-law claims to state court—if that court had determined there was no federal jurisdiction over his claim.

b. Nor should this Court grant review to address petitioner's further contention (Pet. 20-23) that federal courts do in fact have jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to modify restitution orders by writ of *coram nobis*. Petitioner's claim is questionable. The All Writs Act by its terms does not provide an independent basis for subject-matter jurisdiction, *ibid.* (authorizing federal courts to "issue all writs necessary or appropriate *in aid of their respective jurisdictions*") (emphasis added); see *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33 (2002), and petitioner identifies no other source of jurisdiction.

In any event, the second question presented does not warrant this Court's review. It is an "abstract question[] of law" in the context of this case, *Stanley*, 105 U.S. at 311, for the same reasons discussed above. See pp. 7-10, *supra*. And neither court below resolved it, which is the basis for petitioner's hypothetical-jurisdiction claim. This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Furthermore, there is no circuit conflict on the second question presented, contra Pet. 22-23. As petitioner notes (Pet. 22), the Seventh Circuit has stated in a footnote—without meaningfully addressing the jurisdictional question—that *coram nobis* is available to challenge a restitution order in at least some circumstances.

United States v. *Mischler*, 787 F.2d 240, 241 n.1 (1986). Petitioner identifies only two other cases as part of the purported conflict—both of which are nonprecedential and do not squarely address *coram nobis* jurisdiction in the restitution context. Although *United States* v. *Stefanoff*, 149 F.3d 1192, 1998 WL 327888 (10th Cir. 1998) (Tbl.), favorably cited *Mischler*, the Tenth Circuit's decision concerned the collection of a criminal fine, not restitution. *Id.* at *1. And *Campbell* v. *United States*, 330 Fed. Appx. 482 (5th Cir. 2009) (per curiam), was a habeas case, so its statement that "[a] district court lacks jurisdiction to modify a restitution order [by] * * * writ of coram nobis" is dictum. *Id.* at 483. Petitioner's contention about the reach of *coram nobis* does not satisfy this Court's criteria for granting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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